Supreme Court, U. S.
FILED
MAR 22 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1977

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**NO. 77-1194**

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RODOLFO LOZANO,

*Petitioner,*

v.

THE TEXAS MEXICAN RAILWAY COMPANY,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## BRIEF FOR RESPONDENT IN OPPOSITION

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## STATEMENT OF THE CASE

Petitioner's statement of the case is substantially correct. However, Respondent disagrees with the allegation contained in the statement regarding the physical condition of the tie on which Petitioner was injured. The evidence at trial did not establish that the Petitioner slipped on a freshly creosoted, wet and muddy railroad tie. Petitioner's description of the proceedings below is substantially correct, however, it should be added that Petitioner did file a Motion for New Trial which was denied by the Trial Court. It should

also be noted that Petitioner did not file a Motion for Rehearing with the Court of Appeals after the Trial Court was affirmed.

## ARGUMENT

The decision by the Fifth Circuit upholding the directed verdict granted by the Trial Court is consistent with applicable decisions of this Court. *Inman* v. *Baltimore & Ohio Railway Co.*, 361 U.S. 138 (1959); *Brady* v. *Southern R. Co.*, 320 U.S. 476 (1943). Petitioner's basic contention is that the granting of the directed verdict below is in conflict with previous decisions by this Court "demanding" that an FELA case be submitted to the jury. Petitioner relies on *Rogers* v. *Missouri Pacific Railway Co.*, 352 U.S. 500 (1957) in support of this proposition. However, Petitioner has misconstrued the holding in *Rogers, supra.*

*Rogers* does not stand for the proposition that directed verdicts are never appropriate in FELA cases. Under *Rogers,* the trial judge still has the responsibility of appraising the proofs to determine whether a jury question is presented. If the court decides that, with reason, the conclusion may not be drawn that negligence on the part of the employer played any part in the injury of the employee, then it must keep the case from the jury. This Court recognized in *Rogers* that an FELA case should not go to the jury "where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Rogers, supra* at 510. The test set out in *Rogers* is merely a restatement of the criteria previously established by this



Court for determining when a directed verdict should be granted in an FELA case:

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims. *Brady* v. *Southern R. Co.*, 320 U.S. 476, 479-80 (1943); *accord, Service Auto Supply Co. of P.R.* v. *Harte & Co.*, 533 F.2d 23, 25 (1st Cir. 1976).

Pursuant to the *Rogers* standard, four members of the federal bench have appraised the proofs in this case and they have properly determined that a jury could not, with reason, conclude that the employer's negligence played any part in petitioner's injuries. Since this determination is consistent with precedent established by this Court, Petitioner has failed in his attempt to show that the decision of the Fifth Circuit is in conflict with applicable decisions of this Court.

A further indication that *Rogers* has not eliminated directed verdicts in FELA cases is the fact that this Court has held, in an FELA case subsequent to *Rogers,* that no jury question is presented where the evidence is so slender and tenuous "that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury." *Inman* v. *Baltimore & Ohio R. Co.*, 361 U.S. 138, 140 (1959). There have been other post-*Rogers* FELA cases where the evidence was such that the case should not have been submitted to the jury, all of which have been denied certiorari by this Court. *E.g., Davis*

v. *Burlington Northern, Inc.*, 541 F.2d 182 (8th Cir. 1976), *cert. denied*, 429 U.S. 1002 (1976); *Hartel* v. *Long Island Railroad Co.*, 476 F.2d 462 (2nd Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); *MacPherson* v. *Boston and Maine Corp.*, 439 F.2d 1089 (1st Cir. 1971), *cert. denied*, 404 U.S. 947 (1971). These cases demonstrate that the courts still have a responsibility to maintain meaningful judicial supervision over FELA actions.

Petitioner's singular reliance on *Rogers* also leads him to criticize the Fifth Circuit's reference, in the opinion below, to *Detroit, T. & I. R. Co.* v. *Banning*, 173 F.2d 752 (6th Cir. 1949), *cert. denied*, 338 U.S. 815 (1949) in support of the statement that continuing repairs during a light, misty rain has not been considered negligence.

*Banning* involved an FELA action brought by an injured employee complaining that the defendant did not provide him with a safe place to work because he was required to work in the yard under muddy conditions, so that his boots became slippery and covered with mud. The court held that so long as the carrier provided means to counteract or avoid any temporary dangerous working condition resulting from severe climatic conditions, it was not negligence to continue with operation of the train. The *Banning* holding is consistent with similar rulings on the question of climatic conditions, *e.g.*, *Raudenbush* v. *Baltimore & Ohio R. Co.*, 160 F.2d 363 (3rd Cir. 1947), *accord*, *Rose* v. *Atlantic Coast Line Railroad Co.*, 277 F. Supp. 913, 919 (D.S.C. 1967), *affirmed* 403 F.2d 204 (4th Cir. 1968); *McGivern* v. *Northern Pac. Ry. Co.*, 132 F.2d 213 (8th Cir. 1942). Nevertheless, Petitioner argues that *Banning* is not controlling because it was decided prior to *Rogers, supra*, even though the question of climatic conditions was not involved in *Rogers, supra*.



Petitioner's criticism of the Fifth Circuit's reliance on *Banning* is inconsequential because he states that the correct rule of law on this question is "that the railroad has a duty to furnish sufficient instruments and other aids to decrease the danger from climatic conditions if this can be reasonably done." (Pet. Writ. Cert., 7) The Fifth Circuit's opinion in the present case specifically states that the "employer also attempted to protect against the development of any dangerous condition by providing a foot scraper to remove any mud." *Lozano* v. *The Texas Mexican Railway Co.*, 564 F.2d 720, 721 (5th Cir. 1977). Hence, the Fifth Circuit's decision to uphold the directed verdict is consistent with the rule of law cited by Petitioner.

Petitioner also complains that the Fifth Circuit should not have referred, in the opinion below, to the common industry practice of continuing repairs while a light, misty rain is falling. Again, this criticism provides no benefit to Petitioner. Respondent agrees with the rule of law cited by Petitioner that what is usually done may be evidence of what ought to be done, but that what ought to be done is fixed by a standard of ordinary prudence. However, at trial, the Petitioner failed to introduce any evidence to show that compliance with a standard of ordinary prudence would have required the Respondent to have done something different. The Petitioner presented no evidence at trial to show that what the Respondent did was *not* in compliance with the standard of ordinary prudence. The burden was on the Petitioner and the Petitioner simply failed to discharge this burden.

## CONCLUSION

A Petition for Writ of Certiorari should be denied in this case because Petitioner has wholly failed to sustain its burden of establishing under Rule 19 that there are special and important reasons why the writ should be granted. Certiorari should particularly be denied because this Court is being asked to merely reassess facts which have been previously judicially appraised by a total of four federal judges. The Court of Appeals correctly held that the Trial Court properly granted a directed verdict in this case.

Respectfully Submitted,

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